



August 6, 2002

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2002-4316

Dear Ms. Sims:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166710.

The City of Lubbock (the "city") received four requests for information regarding a SWAT incident that occurred on July 13, 2001, including the Lubbock Police Department Shooting Review Board report, the transcript of Tom Mann's October 18, 2001 interview of Wade Lee, the PowerPoint presentation created by ballistics expert Lucien Haag and/or his company explaining his findings in relation to the shooting death of Officer Kevin Cox, the expenses paid to Lucien Haag and/or his company for his services as a paid expert, all joint exhibits submitted to the Shooting Review Board, and all other open records requests received by the city. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted by counsel for one of the requestors. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we note that you seek a decision from this office only with respect to the submitted Firearms Review Board report and a transcript of an interview with Officer Wade Lee. Therefore, we assume that you have released any remaining responsive information to the requestors. If you have not released any such information, you must release it to the requestors at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, we note that the submitted report is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted Firearms Review Board report is a completed report. Thus, this information must be released under section 552.022(a)(1) unless it is expressly confidential under other law or excepted from disclosure under section 552.108.

You contend that the requested information is made confidential under section 143.089(g) of the Local Government Code and therefore must be withheld from the public pursuant to section 552.101 of the Government Code.¹ Section 143.089 provides in pertinent part:

(a) The director [of the fire fighters' and police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

....

(2) any misconduct by the fire fighter or the police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and

....

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by Subsection (a)(2) shall be removed from the employee's file if the commission finds that:

(1) the disciplinary action was taken without just cause; or

(2) the charge of misconduct was not supported by sufficient evidence.

....

¹Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

(f) The director or the director's designee may not release any information contained in a fire fighter's or police officer's personnel file without first obtaining the person's written permission, unless the release of the information is required by law.

(g) A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In Open Records Decision No. 562 (1990), this office discussed the confidentiality of personnel file information maintained by cities that have adopted the police officers' civil service law in accordance with the provisions of chapter 143 of the Local Government Code. Section 143.089 of the Local Government Code provides for the creation of two personnel files: one that is maintained by the city's civil service director and the other by the city police department.

Section 143.089(a) specifies certain types of information that must be contained in the civil service file; such records are not made confidential under section 143.089 and thus are subject to release unless an exception to required public disclosure applies. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

A police officer's disciplinary records must be contained in the civil service file only if the misconduct results in disciplinary action by the police department "in accordance with this chapter." Local Gov't Code § 143.089(a)(2). Otherwise, those records must be maintained as part of the police department's internal file contemplated under section 143.089(g). *See generally* Attorney General Opinion JC-0257 (2000). In this instance, you inform us that the requested information relates to an investigation that resulted in the indefinite suspension of a particular officer, but that the officer is now appealing that disciplinary action. We understand you to contend that because of the pending appeal, these records must be maintained only in the police department's confidential internal personnel file created under section 143.089(g).

We note, however, that an officer's civil service file must contain documents relating to any misconduct in those cases where the department took disciplinary action against the officer. *See* Local Gov't Code § 143.089(a)(2); *see also* Local Gov't Code §§ 143.051-.055 (describing "disciplinary action" for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000). The submitted information relates to the misconduct that

resulted in the officer's indefinite suspension. Therefore, this information is also subject to section 143.089(a)(2) and while it may be kept in the police department's personnel file, it also must be forwarded and placed in the officer's civil service file until such time as the civil service commission determines that either 1) the disciplinary action was taken without just cause or 2) the charge of misconduct was not supported by sufficient evidence. *See* Local Gov't Code § 143.089(c).

We note, however, that much of the information in the submitted Firearms Review Board report pertains to officers who were not disciplined. Therefore, the submitted information should be maintained in these officers' internal personnel files in accordance with section 143.089(g) of the Local Government Code. Such information must not be placed in these officers' civil service files. Further, information that identifies these officers may not be placed in the disciplined officer's civil service file. Accordingly, only a redacted copy of the submitted information may be placed in the disciplined officer's civil service file. Thus, we have marked the information that must be withheld from the submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The remaining information must be maintained in the disciplined officer's civil service file and is subject to release unless an exception to required public disclosure applies.

You also claim that portions of the submitted Firearms Review Board report are excepted under section 552.108 of the Government Code. Section 552.108 of the Government Code provides in pertinent part as follows:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(b)(1). This office has stated that certain procedural information may be withheld under section 552.108 of the Government Code, or its statutory predecessors. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (forms indicating location of off-duty police officers), 413 (1984) (security measures to be used at next execution), 143 (1976) (specific operations or specialized equipment directly related to investigation or detection of crime). To claim this aspect of section 552.108 protection, however, a governmental body must meet its burden of explaining, if the requested information does not supply the explanation on its face, how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body

did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention).

You state that the submitted Firearms Review Board report “goes over in detail how an officer should correctly respond in a SWAT-type action.” You argue that if such information were released, “the police would be at a great disadvantage in any dangerous situation in which the SWAT team may be called out.” After careful review of the submitted information, we conclude that some of the information, which we have marked, may be withheld under section 552.108(b)(1) of the Government Code.

Finally, we note that portions of the Firearms Review Board report must be withheld under section 552.101 of the Government Code. Section 552.101 encompasses common-law privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Accordingly, we have marked the information in the submitted Firearms Review Board report that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

To summarize, we conclude that: (1) we have marked the information in the submitted documents that is confidential under section 143.089(g) of the Local Government Code and must therefore be withheld under section 552.101 of the Government Code; (2) we have marked the information in the submitted documents that must be withheld under section 552.101 in conjunction with common-law privacy; and (3) we have marked the information that may be withheld under section 552.108(b)(1). The remaining information must be released to the requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 166710

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